

Assessing Adults for Guardianship September 20, 2010

Guardianship and the Court Process

Presented by:

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Probate Court

- **How is Probate Court different from other courts?**
- **Where do I find the laws that apply?**

The Maine Probate Code: 18-A M.R.S.A. §§ 1-101- 9-404.

Specifically, Protection Of Persons Under Disability And Their Property 18-A M.R.S.A. §§ 5-101 - 5-964.

Both available at: www.mainelegislature.org/legis/statutes/18-A/title18-Ach0sec0.html.

The Maine Rules of Probate Procedure: available at:

www.courts.state.me.us/rules_forms_fees/rules/MRProbP%207-04.pdf.

These rules tell you how the court proceeding works: deadlines, length of documents, etc.

- **How will your client end up in a guardianship proceeding in Probate Court?**

Petition for Guardianship

Turning 18

The Individual Makes Decisions That Person(s) In Her Life Disagree With

Termination/Removal/Resignation

Made by “any person interested in the ward’s welfare.”

Request can be made by “informal letter to the court or judge and any person who knowingly interferes with transmission of this kind of request to the court or judge may be adjudged guilty of contempt of court.” 18-A M.R.S.A. §5-307 (a)-(b).

- **Is my client entitled to an Attorney?**

Yes!

“If it comes to the court's attention that the allegedly incapacitated person wishes to contest any aspect of the proceeding or to seek any limitation of the proposed guardian's powers, the court shall appoint an attorney to represent the allegedly incapacitated person. The cost of this appointment . . . must be paid from the estate of the allegedly incapacitated person if the court is satisfied sufficient funds are available.” 18-A M.R.S.A. §5-303(b)

Capacity In Maine Guardianship Proceedings

- What are the relevant laws?

Incapacitated Person

“Incapacitated person” is defined as “any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication or other cause except minority to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person.” 18-A M.R.S.A § 5-101(1).

Evidentiary Standard

“The court may appoint a guardian or coguardians as requested if the court finds by **clear and convincing** evidence that the person for whom a guardian is sought is incapacitated and that the appointment is necessary or desirable as a means of providing continuing care and supervision of the incapacitated person.” 18-A M.R.S.A. § 5-304(B) (emphasis added).

Limited Guardianship

“The court shall exercise the authority . . . so as to encourage the development of maximum self reliance and independence of the incapacitated person and make appointive and other orders only to the extent necessitated by the incapacitated person's actual mental and adaptive limitations or other conditions warranting the procedure.” 18-A M.R.S.A. § 5-304(A).

In re Guardianship of Collier the Law Court explained that probate courts are required to tailor the duties of a guardian to the ward’s specific needs “[b]ecause the appointment of a full guardian affects the fundamental personal liberty of the prospective ward, it should not be done without careful consideration of the ward’s specific needs.” 653 A.2d 898, 902

- What are some opportunities for advocacy?

Sample Team Meeting Questions (Handout 1)

Physician’s Psychologist’s Report: PP-505 (Handout 2)

Handout 1

Sample Team Meeting Questions: Considering Guardianship

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September 20, 2010
Guardianship and the Court Process**

Sample Team Meeting Questions: Considering Guardianship

Every member of the team should think about and answer these questions in an open discussion. Conclusions or areas of agreement should be recorded.*

1. What things does the person need help with?
2. How does Guardianship specifically allow the person to get help with the things they need?
3. Does the person accept help with these things?
4. What things do you think this person is unable to do or understand-even with assistance?
5. What things could the person learn to do, or do part of with help and practice?
6. Does the person understand financial contracts enough to enter into one? (classic examples: credit cards, cell phone contracts) (It is important to be realistic about this one! College students are given credit cards all the time and we enter into cell phone contracts and rarely read the fine print!)
7. Does the person understand day-to-day conversations with their medical providers about their health and medications (with help if needed)?
8. Does the person ask for help or accept help with medical decisions or scheduling appointments?
9. What are your biggest fears about this person not having a guardian?
10. How will a court-ordered guardian help with those fears?
11. Thinking about all of the options between no guardian and no help all the way to full guardianship, what do you think would be the most helpful for this person to be safe and have the support they need to make decisions?
12. Even if the team decides that guardianship may be appropriate, what things can the individual do or decide for themselves so the judge can put these things in the guardianship plan.

* Please note that the admission of this document to court will require compliance with the Maine Rules of Evidence. The court may require that this document be properly “authenticated” by having the person that drafted it testify at hearing.

Handout 2

Physician's/Psychologist's Report ***PP-505***

Assessing Adults for Guardianship
September 20, 2010
Guardianship and the Court Process

STATE OF MAINE

_____ COUNTY PROBATE COURT

DOCKET _____

In Re: _____

PHYSICIAN'S/PSYCHOLOGIST'S REPORT:
GUARDIANSHIP AND/OR
CONSERVATORSHIP PROCEEDING¹

I, _____, am a physician/psychologist licensed to practice in
the State of Maine, having an office at _____.

My professional relationship with _____,
alleged to be an incapacitated person, is as follows: _____

I examined him/her on _____.

I found the following:

1. History pertinent to current condition:

2. Diagnosis:

3. Prognosis:

4. If the appointment of a guardian is sought (answer either A **OR** B)²:

_____ A. It is my opinion that the mental and functional condition of _____
To care for himself/herself and/or to make, communicate or implement decisions about his/her
well-being is limited. _____ is incapable of performing ANY of the
tasks listed in 4(B).

OR

_____ B. I have checked below all things I believe the patient ~ possess sufficient mental and physical
capacity to perform, and I have indicated when appropriate, whether such functions can be
performed only with assistance:

- (1) _____ Establish his/her place of abode.
- (2) _____ Place himself/herself in any hospital or any other institution for care as appropriate.
- (3) _____ Make provisions for his/her care, comfort and maintenance.
- (4) _____ Give or withhold consents or approvals related to medical or other professional care,
counsel, treatment or service.
- (5) _____ To manage, protect, and expend assets and income consistent with 18-A MRSA §5-312

5. If the appointment of a conservator is sought (answer either A **OR** B)³:

_____ A. It is my opinion that the mental and functional condition of _____
to manage his/her property and financial affairs is limited. _____
is incapable of performing any of the tasks listed in 5(B).

OR

_____ B. I have checked below all things I believe the patient ~ possess sufficient mental and physical
capacity to perform, and I have indicated when appropriate, whether such functions can be
performed only with assistance:

- (1) _____ Receive money and tangible property and apply the money and property for his/her
support, care and education.
- (2) _____ Collect, hold and retain assets (including real estate).
- (3) _____ Deposit funds in and withdraw funds from any bank account or other institution
- (4) _____ Invest and reinvest his/her assets.
- (5) _____ Dispose of assets.
- (6) _____ Pay bills.
- (7) _____ Establish and use credit and borrow money.
- (8) _____ Pay, settle, prosecute or contest any claim involving him/her.
- (9) _____ Sell or exercise stock subscription or conversion rights.
- (10) _____ Enter into any contract, financial commitment or lease arrangement.
- (11) _____ Continue or participate in the operation of any business or other enterprise.
- (12) _____ Vote a security, in person or by general or limited proxy.
- (13) _____ Make ordinary or extraordinary repairs or alterations to or in buildings or other
structures belonging to him/her.
- (14) _____ Employ persons, including attorneys, auditors, investment advisors or agents, to advise
or assist him/her.

DATED: _____

Physician/Psychologist

¹ See 18-A MRSA §§ 5-303 and 5-407. This report shall be submitted to the court and all parties at least 10 days before any hearing.

² The development of maximum self-reliance and independence of the patient must be encouraged whenever possible. See 18-A MRSA § 5-304(a)

³ See 18-A MRSA § 5-408.